Supreme Court, U.S.
FILED
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(4)

No. 87-1168

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DONALD E. CLARK AND PEGGY S. CLARK

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED JANUARY 11, 1988
CERTIORARI GRANTED MARCH 7, 1988

69 pp

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JOINT APPENDIX

TABLE OF CONTENTS*

		Page
1.	Relevant docket entries in the court of appeals ..	1
2.	Relevant docket entries in the Tax Court	4
3.	Petition (with attachments)	7
4.	Answer	23
5.	First stipulation for trial	25
6.	Stipulation exhibit G—Schedule of federal income tax return of Basin Surveys, Inc. for period beginning 2/1/79 and ending 4/18/79 .	30

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* The opinions and orders of the court of appeals and the Tax Court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

7. Second stipulation for trial 33
8. Transcript of 5/1/84 Tax Court hearing 35
9. Decision of Tax Court 66
10. Order granting certiorari 68

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1736

DONALD E. CLARK AND PEGGY S. CLARK,
PLAINTIFFS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE,
DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
12/22/86	Docketing statement filed by Appellant [47662-1]. T/S needed: y; T/S already on file y. [86-1736] (dhb) [Entry date 12/23/86]
12/23/86	Tax case docketed. (dhb)
12/23/86	Docketing notice issued. [86-1736] (dhb)
2/9/87	Record on appeal filed. (Pleadings: Vol. I T/S: Vol. II Exhibits: Vol. III (jacket)). [86-1736] (dhb)
2/9/87	Briefing order filed. A/P brief due: 03/23/87 Projected calendar: June 1987 [86-1736] (dhb)
3/23/87	Brief and joint appendix filed by Appellant. Type of Service: CS, Copies of brief: 12, Copies of apx: 6. [86-1736] (eac) [Entry date 3/24/87]
4/1/87	Case referred to OSC for screening. [86-1736] (ski)

4/2/87 OSC case referred to clerk for calendaring. [86-1736] (vsl)

4/16/87 Case tentatively calendared for oral argument Term: June Place: Richmond. [86-1736] (ski)

4/28/87 Case calendared for oral argument. [86-1736] (ski)

4/28/87 Brief received without filing from Appellee Donald E. Clark. [86-1736] (wtc)
[Entry date 4/29/87]

5/6/87 Motion filed by Appellee to allow attachment to brief as a supplement [77471-1]. [86-1736] (dhb)

5/12/87 Reply brief filed by Appellant. Type of Service: cs Copies: 12. [86-1736] (ks)
[Entry date 5/14/87]

5/21/87 Court order filed by KKH, JHW, FNS granting motion to allow attachment to brief [77471-1] Copies to attorney for Appellee, attorney for Appellant. [86-1736] (dhb)
[Edit date 9/8/87]

5/21/87 Brief filed by Appellee. Type of Service: G, Copies: 12. [86-1736] (ks)

6/3/87 Oral argument heard. Courtroom Deputy: jlc. [86-1736] (jc)

9/4/87 Per Curiam opinion (P) filed. Panel: KKH, JHW, Writing Judge, FNS; Decision: affirmed. [86-1736] (bhr)

9/4/87 Judgment order filed. [86-1736] (bhr)

9/25/87 Mandate issued. [86-1736] (emb)

9/25/87 Record on appeal returned to U.S. TAX COURT. (Pleadings: VOLUME I T/S: VOLUME II Exhibits: VOLUME III). [86-1736] (emb)

10/19/87 Federal Reporter Citation: 828 F.2d 221. [86-1736] (elf)
[Entry date 11/4/87]

1/19/88 Supreme Court notice received of filing of petition for certiorari on 01/11/88. Supreme Court No. 87-1168. [86-1736] (emb)
[Entry date 1/22/88]

3/10/88 Supreme Court order filed granting petition for certiorari. [86-1736] (jm)
[Entry date 3/11/88]

UNITED STATES TAX COURT

No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET ENTRIES

DATE	FILINGS AND PROCEEDINGS
Apr. 26, 1983	PETITION FILED: FEE PAID Date Served Apr. 28, 1983
Apr. 26, 1983	REQUEST by Petrs. for trial at Washington, DC GRANTED Apr 26, 1983 Date Served Apr 28, 1983
May 20, 1983	ANSWER by Resp. (C/S 5/18/83)
Feb. 2, 1984	NOTICE OF TRIAL on April 23, 1984 at Washington, D.C. Date Served Feb. 2, 1984
Apr. 2, 1984	FIRST STIPULATION FOR TRIAL PREAMBLE filed. (Exhibits attached)
Apr. 23, and May 1, 1984	TRIAL at Washington, D.C. before Judge Tannenwald. Second Stipulation for trial with att'd exhibits filed May 1, 1984. ORIGINAL BRIEFS DUE: August 29, 1984

	REPLY BRIEFS DUE: Oct. 29, 1984 SUBMITTED TO JUDGE TANNENWALD.
May 24, 1984	TRANSCRIPT for May 1, 1984 received.
Aug. 29, 1984	BRIEF for Resp. filed. Date Served Aug 30, 1984
Aug 29, 1984	BRIEF for Petr. filed Date Served Aug 30, 1984
Sept 18, 1984	JOINT MOTION to correct transcript. Action Granted Sept. 20, 1984 Date Served Sept. 24, 1984
Oct. 26, 1984	REPLY BRIEF for Resp. filed. Date Served Oct. 30, 1984
Oct. 29, 1984	REPLY BRIEF For Petr. filed. Date Served Oct. 30, 1984
Feb. 6, 1986	FINDINGS OF FACT OPINION filed, Judge Tannenwald. Decision will be entered under Rule 155. Date Served Feb. 6, 1986
Mar. 7, 1986	ORDER, that the Opinion filed on Feb. 6, 1986, to be amended as follows: Delete pages 24, 26, 29, 31, and substitute attached pages 24, 26, 29, and 31. Date Served Mar. 14, 1986
Sept 9, 1986	AGREED COMPUTATION filed.
Sept 18, 1986	DECISION ENTERED, Judge Tannenwald. Date Served Sept. 18, 1986
	APPELLATE PROCEEDINGS
Dec 16, 1986	NOTICE OF APPEAL to U.S.C.A., 4th Cir., filed by Resp. Date Served Dec 17, 1986

Dec 17, 1986	NOTICE of Filing with copy of notice of appeal mailed to counsel of record for petrs. Date Served Dec 17, 1986
Dec 17, 1986	NOTICE, to parties, of assembling and date for transmission of record. Date Served Dec 17, 1986

UNITED STATES TAX COURT

No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

PETITION

The petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (symbols: AP:LO:JDT:DL) dated February 3, 1983, and as the basis of their case allege as follows:

1. Petitioners are husband and wife and now maintain their legal residence at 4 Kent Street, Buckhannon, West Virginia 26201. Petitioners timely filed a joint federal income tax return for their taxable year ended December 31, 1979 with the Internal Revenue Service Center at Memphis, Tennessee. Their social security numbers are 324-28-2334 and 320-30-8857, respectively. References hereinafter to "Petitioner" or to "Clark" refer to Donald E. Clark.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit "A") was mailed to petitioners on February 3, 1983 and was issued by the Office of the Internal Revenue Service at Louisville, Kentucky.

3. The deficiency as determined by the Commissioner is in income tax for calendar year 1979 in the amount of $972,504.74. All of said deficiency is in dispute.

4. The determination of tax set forth in said notice of deficiency is based on the following error:

(a) The Commissioner erred in determining that Petitioner received dividend income in the amount of $2,319,611 when he exchanged all of the outstanding stock of Basin Surveys, Inc. (hereinafter "Basin Surveys") for 300,000 shares of common stock of NL Industries, Inc. (hereinafter "NL") and $3,250,000 cash.

5. The facts upon which petitioners rely as the basis of their case are as follows:

(a) Until April 18, 1979, Petitioner owned all of the outstanding stock of Basin Surveys.

(b) On April 18, Basin Surveys was merged, pursuant to the provisions of state law, into NL Acquisition Corporation, a wholly-owned subsidiary of NL. The transaction qualified as a "reorganization" under sections 368(a)(1)(A) and 368(a)(2)(D) of the Internal Revenue Code of 1954, as amended.

(c) At the final stage of the negotiations which led to the merger, NL offered Petitioner a choice among alternative forms of payment for his Basin Surveys stock. Petitioner could either receive 425,000 shares of NL common stock as the sole consideration or he could receive 300,000 shares of NL common stock and $3,250,000 in cash in lieu of the additional NL shares.

(d) Petitioner chose to receive, and did receive, in exchange for his Basin Surveys stock, 300,000 shares of NL common stock and, in addition, $3,250,000 cash instead of an additional 125,000 shares of NL common stock.

(e) As of the end of March 1979, NL had outstanding approximately 32,533,000 shares of common stock and 500,000 shares of preferred stock. Hence, after the merger, Clark owned approximately 0.92%

of all outstanding NL common stock. If, in contrast, he had chosen the all-stock deal and received an additional 125,000 shares of NL common stock, he would have owned approximately 1.3% of all outstanding NL common stock. By taking cash, he reduced his stock ownership of NL to 70.6% of what it would have been if no cash had been involved.

(f) As of April 18, 1979, Basin Surveys had total assets of $2,758,069 and liabilities of $808,132, as reported on Schedule L of its federal income tax return for its short taxable year ended on that date. Among its assets were $138,490 in cash, $1,231,552 in trade notes and accounts receivable (after allowance for bad debts) and buildings and other fixed depreciable assets with a book value (after accumulated depreciation) of $929,306.

(g) The payment of cash by NL to Petitioner as part of the consideration for his Basin Surveys stock did not, in whole or in part, have the effect of the distribution of a dividend.

WHEREFORE, petitioners pray that the Court determine that no deficiency exists in their income taxes for their taxable year ended December 31, 1979 and that the Court grant such other and further relief as it may deem proper.

/s/ WALTER B. SLOCOMBE
Walter B. Slocombe

/s/ DANIEL B. ROSENBAUM
Daniel B. Rosenbaum

/s/ DANIEL M. DAVIDSON
Daniel M. Davidson
Counsel for Petitioners
Caplin & Drysdale, Chartered
1101 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 862-5000

Date of Signatures: April 26, 1983

Exhibit A

Internal Revenue Service
Department of the Treasury

Date: Feb 03 1983

Mr. Donald E. Clark and
Mrs. Peggy S. Clark
4 Kent St.
Buckhannon, WV 26201

CERTIFIED MAIL NO.
1016-652

Social Security or
Employer Identification
Number:
324-28-2334
Tax Year Ended and
Deficiency:

December 31, 1979
$972,504.74

Person to Contact: Jack D. Taylor
Contact Telephone Number: (304) 422-8551, ext. 1289

Dear Mr. and Mrs. Clark:

We have determined that there is a deficiency (increase) in your income tax as shown above. This letter is a NOTICE OF DEFICIENCY sent to you as required by law. The enclosed statement shows how we figured the deficiency.

If you want to contest this deficiency in court before making any payment, you have 90 days from the above mailing date of this letter (150 days if addressed to you outside of the United States) to file a petition with the United States Tax Court for a redetermination of the deficiency. The petition should be filed with the United States Tax Court, 400 Second Street NW., Washington, D.C. 20217, and the copy of this letter should be attached to the petition. The time in which you must file a petition with

the Court (90 to 150 days as the case may be) is fixed by law and *the Court cannot consider your case if your petition is filed late.* If this letter is addressed to both a husband and wife, and both want to petition the Tax Court, *both* must sign the petition or each must file a separate, signed petition. You can get a copy of the rules for filing a petition by writing to the Clerk of the United States Tax Court, at the address shown in this paragraph.

If you decide not to file a petition with the Tax Court, we would appreciate it if you would sign and return the enclosed waiver form. This will permit us to assess the deficiency quickly and will limit the accumulation of interest. The enclosed envelope is for your convenience. If you decide not to sign and return the waiver and you do not timely petition the Tax Court, we will assess and bill you for the deficiency after 90 days from the above mailing date of this letter (150 days if this letter is addressed to you outside the United States).

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ ROSCOE L. EGGER, JR.
Roscoe L. Egger, Jr.
Commissioner

By
H. LARRY STEWART
H. Larry Stewart
Associate Chief
Louisville Appeals Office

Enclosures:
Copy of this letter
Statement
Waiver
Envelope
cc: Daniel B. Rosenbaum
Donald B. Nestor
P.O. Box 1588,
Louisville, KY 40201

Letter 894(RO) (Rev. 4-82)

Form 4089 Symbols
(Rev. April 1979) AP:LO:JDT:DL
Department of the Treasury—Internal Revenue Service
Notice of Deficiency-Waiver

Name and Address of Taxpayer(s)
Mr. Donald E. Clark and
Mrs. Peggy S. Clark
4 Kent Street
Buckhannon, WV 26201

Kind of Tax Income

Copy to Authorized Representative
Mr. Daniel B. Rosenbaum
1101 17th St., N.W.
Washington, DC 20036

Mr. Donald B. Nestor, CPA
Toothman, Rice & Co.
Professional Arts Plaza
Buckhannon, WV 26201

Taxable Year Ended December 31, 1979

Increase in Tax $972,504.74

See the attached explanation for the above deficiencies

I consent to the immediate assessment and collection of the deficiencies (increased in tax and penalties) shown above, plus an interest provided by law.

Your signature ► ..... _____
(Date signed)

Spouse's Signature,
If A Joint Return
Was Filed ► ..... _____
(Date signed)

Taxpayer's Representative
Sign Here ► ..... _____
(Date Signed)

Corporate Name: ► .....

Corporate Officers ► .....
(Signature) (Title) (Date signed)

Sign Here ► .....
(Signature) (Title) (Date signed)

Note:

If you consent to the assessment of the amounts shown in this waiver, please sign and return it in order to limit the accumulation of interest and expedite our bill to you. Your consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are entitled to a refund; nor prevent us from later determining, if necessary, that you owe additional tax; nor extend the time provided by law for either action.

If you later file a claim and the Internal Revenue Service disallows it, you may file suit for refund in a district court or in the United States Court of Claims, but you may not file a petition with the United States Tax Court.

Who Must Sign

If this waiver is for any year(s) for which you filed a joint return, both you and your spouse must sign the original and duplicate of this waiver form unless one of you are acting under a power of attorney, signs as agent for the other.

This waiver may be signed by your attorney or agent provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany this form.

If this waiver is signed by a person acting in a fiduciary capacity (such as executor, administrator, trustee), Form, Notice of Fiduciary Relationship, should, unless previously filed, accompany this form,

If this waiver is for a corporation, it must be signed with the corporate name followed by the signautre and title of the officer(s) authorized to sign.

If you agree, please sign one copy and return it; keep the other copy for your records.

Form 4089 (Rev.)

Form 5278 1040
(Rev. May 1978) 1

Statement – Income Tax Changes

Name(s) of Taxpayer(s)
Mr. Donald E. Clark and
Mrs. Peggy S. Clark

☒ Notice of Deficiency
☐ Settlement Computation ☐ Other (*specify*)

	Tax Years Ended 12/31/79
1. Adjustments to income	
a. Dividends	2,319,611.00
b. Capital Gain	(905,962.00)
c. Interest Income	63,647.00
d. Rental Depreciation	2,000.00
e.	
f.	
g.	
2. Total adjustments	1,479,296.00
3a. ☒ Table income ☐ Adjusted gross income	
b. As shown in: ☐ Tax table income	
☐ Preliminary letter dated _____ ☐ Notice of deficiency dated _____	
☒ Return as filed	1,316,256.00
4. ☒ Taxable income as revised	
☐ Adjusted gross income as revised	
☐ Tax table income as revised	2,795,552.00

5. Tax from	
☐ Tax tables	
☒ Schedule 2	
☒ Tax rate schedules	1,910,096.74
6. Alternative tax if applicable (*from page _____*)	
7. Tax surcharge	
8. Corrected tax liability (*lesser of line 5 or 6, plus line 7*)	
9. Less credits *(specify)*	
a Investment, return	1,551.00
b.	
c.	
10. Balance *(line 8 less amounts on lines 9a through 9c)*	1,908,545.74
11. Plus	
a. Tax from recomputing prior year investment credit	
b. Self-employment tax	
c. Minimum tax	0
12. Total corrected income tax liability *(line 10 plus amounts on lines 11a through 11c)*	1,908,545.74
13. Total tax as previously adjusted*	936,041.00
14. Increase in tax *(difference between lines 12 and 13)*	972,504.74
15. Additions to the tax *(listed below)*	
*Tax per return	893,533.00
Additional assessment 01-06-83	42,508.00
Tax as previously adjusted	936,041.00

Form 886-A
(Rev April 1968)

Schedule No. 1a

EXPLANATION OF ITEMS

Name of Taxpayer
Mr. Donald E. Clark and
Mrs. Peggy S. Clark

Year/Period Ended
12/31/79

(a) It is determined, pursuant to Internal Revenue Code section 356, that you received dividend income in the amount of $2,319,611.00 when you transferred your stock in Basin Surveys, Inc., and a five-year covenant not to compete in exchange for 300,000 shares of NL Industries, and $3,250,000 cash "boot". Accordingly, your taxable income is increased $2,319,611.00. See computation below:

(b) It is determined that your long-term capital gain from the exchange of your stock in Basin Surveys, Inc., for the stock of NL Industries is $930,389.00 in lieu of $3,195,294.00 shown in your return. Therefore, your taxable gain is decreased $905,962.00, as detailed below.

Form 886-A
(Rev. April 1968)

Schedule No. 1a (cont'd)

EXPLANATION OF ITEMS

Name of Taxpayer
Mr. Donald E. Clark and
Mrs. Peggy S. Clark

Year/Period Ended
12/31/79

Exchange of stock:		
N.L. Industries stock – fair market value	$6,000,000.00	
Cash boot	3,250,000.00	$9,250,000.00
Basin Surveys, Inc., stock adjusted basis	$ 84,515.00	
Cost	25,013.00	109,528.00
Gain realized		$9,140,472.00
		Dividend Income
Gain recognized	$3,250,000.00	
Less: Dividends as determined, See Item (a) above	(2,319,611.00)	$2,319,611.00
Per return		-0-
Increase taxable income		$2,319,611.00
		Capital Gain
Long-term capital gains		
Basin Surveys, Inc., stock	$ 930,389.00	
Other, per return	3,399.00	
Net capital gain as determined		$ 933,788.00
Less: Section 1202, Internal Revenue Code, deduction		(560,273.00)
Taxable gain as determined		$ 373,515.00
Taxable gain per return		1,279,477.00
Decrease taxable income		905,962.00

Form 886-A (Rev April 1968) — Schedule No. 1a (cont'd)

EXPLANATION OF ITEMS

Name of Taxpayer: Mr. Donald E. Clark and Mrs. Peggy S. Clark

Year/Period Ended: 12/31/79

(c) It is determined that you received interest income in the amount of $211,940.00 in lieu of $148,293.00 shown in your return. Accordingly, your taxable income is increased $63,647.00.

(d) It is determined that your deduction for depreciation on a building with a basis of $25,000.00, 25-year life, under the straight line method is $1,000.00 in lieu of $3,000.00 shown on your return. Accordingly, your taxable income is increased $2,000.00.

(c) and (d) Agreement to these adjustments was indicated by execution of Form 870, Waiver of Restrictions on Assessments and Collection of Deficiency in Tax and Acceptance of Overassessment, received by the Chief, Appeals Office, Louisville, Kentucky, on November 30, 1982.

SCHEDULE G (Form 1040) — **1979** — 18

Department of the Treasury
Internal Revenue Service

Income Averaging

► See instructions on pages 2 and 3.
► Attach to Form 1040

Name(s) as shown on Form 1040: Mr. Donald E. Clark and Mrs. Peggy S. Clark

Your social security number: 324-28-2334

Base Period Income and Adjustments	(a) 1st preceding base period year 1978	(b) 2d preceding base period year 1977	(c) 3rd preceding base period year 1976	(d) 4th preceding base period year 1975
1 Enter amount from: Form 1040 (1977 and 1978) – line 34 Form 1040A (1977 and 1978) – line 10	141,122.00	138,722.00		
2 Multiple $750 by the total number of exemptions claimed in 1977 and 1978	1,500.00	1,500.00		
3 Taxable income (subtract line 2 from line 1) If less than zero, enter zero (see instructions)	139,622.00	137,222.00	87,296.00	41,993.00
4 Income earned outside of the United States or within U.S. possessions and excluded under sections 911 and 931				
5 On your 1979 Form 1040, if your checked box 2 or 5 enter $3,200; 1 or 4 enter $2,200; 3 enter $1,600 in columns (c) and (d)			3,200.00	3,200.00
6 Base period income (add lines 3, 4 and 5)	139,622.00	137,222.00	90,496.00	45,193.00

Computation of Averageables Income

7 Taxable income for 1979 from Schedule TC (Form 1040), Part I, line 3	7	2,795,552.00		
8 Certain amounts received by owner-employees subject to a penalty under section 72(m)(5)	8			
9 Subtract line 8 from line 7	9	2,795,552.00		
10 Excess community income	10			
11 Adjusted taxable income (subtract line 10 from line 9). If less than zero, enter zero			11	2,795,552.00
12 Add columns (a) through (d), line 6, and enter here	12	412,533.00		
13 Enter 30% of line 12			13	123,759.90
14 Averageable income (subtract line 13 from line 11)			14	2,671,792.10

If line 14 is $3,000 or less, do not complete the rest of the form. You do not qualify for income averaging.

Computation of Tax

15	Amount from line 13		15	123,759.90
16	20% of line 14		16	534,358.42
17	Total add lines 15 and 16)		17	658,118.32
18	Excess community income from line 10		18	
19	Total (add lines 17 and 18)		19	658,118.32
20	Tax on amount on line 19 (see caution below)		20	427,406.82
21	Tax on amount on line 17 (see caution below)	21 427,406.82		
22	Tax on amount on line 15 (see caution below)	22 56,734.34		
23	Subtract line 22 from line 21	23 370,672.48		
24	Multiply the amount on line 23 by 4		24	1,482,689.92
	Note: *If no entry was made on line 8 above, skip lines 25 through 27 and go to line 28.*			
25	Tax on amount on line 7 (see caution below)	25		
26	Tax on amount on line 9 (see caution below)	26		
27	Subtract line 26 from line 25		27	
28	Tax (add lines 20, 24, and 27). Enter here and on Schedule TC (Form 1040), Part I, line 4 and check Schedule G box		28	1,901,096.74

Caution: Use Tax Rate Schedule X, Y or Z from the Form 1040 instructions to figure your tax on lines 20, 21, 22, 25 and 26. Do not use the tax tables.

UNITED STATES TAX COURT

Docket No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled case, admits and denies as follows:

1., 2., and 3. Admits.

4. (a). Denies the respondent erred as alleged in subparagraph (a) of paragraph 4 of the petition.

5. (a). Admits.

5. (b). Denies information or knowledge sufficient to form a belief as to the truth of the allegations in subparagraph (b) of paragraph 5 of the petition.

5. (c). Denies.

5. (d). Admits petitioner received, in exchange for his Basin Surveys stock, 300,000 shares of NL common stock and, in addition, $3,250,000 cash; denies the remaining allegations of subparagraph (d) of paragraph 5 of the petition.

5. (e). Denies information or knowledge sufficient to form a belief as to the truth of the allegations in subparagraph (e) of paragraph 5 of the petition.

5. (f). Admits that Schedule L of Basin Surveys' federal income tax return as of April 18, 1979, reflects assets of $2,758,069, liabilities of $808,132, cash of $138,490, trade notes and accounts receivable (net of

reserve for bad debts) of $1,231,552, and fixed assets (net of accumulated depreciation) of $929,306; denies knowledge sufficient to form a belief as to the truth of the contents of said Schedule L.

5. (g) Denies.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified, or denied.

WHEREFORE, it is prayed that the deficiency determined by the respondent be in all respects approved.

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

By: CONLEY G. WILKERSON
Conley G. Wilkerson
Acting District Counsel

May 18, 1983

OF COUNSEL:
VERNON J. OWENS
Regional Counsel
LARRY L. NAMEROFF
Senior Attorney
Internal Revenue Service
7525 Federal Office Building
550 Main Street
Cincinnati, OH 45202
Tel. No. 513-684-3211

INITIALLED

UNITED STATES TAX COURT

Docket No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

FIRST STIPULATION FOR TRIAL PREAMBLE

In accordance with Tax Court Rule 91(e), the below-signed parties agree to this FIRST STIPULATION FOR TRIAL pursuant to the general terms of this preamble, *unless specifically expressed otherwise.*

A. All stipulated facts shall be conclusive.

B. The *EXHIBIT LIST* (Appendix I) identifies exhibits. Without further words of inclusion, all listed exhibits are expressly incorporated as part of this stipulation. Except as noted, each incorporated exhibit is authentic and admissible as evidence for any relevant purpose.

C. Except for relevancy, all objections to this stipulation and its exhibits are expressly waived unless stated in this stipulation.

D. The *GLOSSARY* below defines special words which appear in capital letters.

TERM	*DEFINITION*
NL	N.L. Industries, Inc.
BASIN	Basin Surveys, Inc.
NLAC	N.L. Acquisition Corp.
MERGER	April 18, 1979 merger of BASIN into NLAC
PLAN	Agreement and Plan of Merger dated April 3, 1979

1. At the time of the filing of the petition, petitioners, Donald E. and Peggy S. Clark, resided at 4 Kent Street, Buckhannon, West Virginia 26201.

2. Petitioners are husband and wife. They timely filed a joint Federal income tax return for 1979 with the Memphis Service Center. (Exhibit B).

3. On February 3, 1983, respondent issued a statutory notice of deficiency (Exhibit A) for 1979 to petitioners determining a deficiency of $972,504.74 based upon the following adjustments:

Dividends	$2,319,611.00
Capital Gain	(905,962.00)
Interest Income	63,647.00
Rental Depreciation	2,000.00
Total	$1,479,296.00

4. Petitioners have previously conceded the interest income and rental depreciation adjustments, and an assessment based on these adjustments was made on January 6, 1983.

5. The sole issue for decision by the Court is whether the payment of cash in the amount of $3,250,000.00 by NL to Donald Clark which he received in the MERGER of BASIN into NLAC on April 18,1979 as part of the consideration for his Basin stock had the effect of a distribution of a dividend under I.R.C. § 356(a)(2) to the extent of BASIN's accumulated undistributed earnings and profits. The dividends and capital gain adjustments set forth in the statutory notice of deficiency are interrelated adjustments stemming from this issue.

6. BASIN was incorporated under the laws of West Virginia in 1963. Its principal business was furnishing radiation, nuclear, and electronic open hole logging services to the petroleum industry.

7. Petitioner Donald Clark was the president of BASIN from 1964 until April 18, 1979.

8. NL is, and was at all times relevant to the MERGER, a New Jersey corporation engaged in manufacturing and supplying petroleum equipment and services, chemicals, and metals.

9. NL is, and was at all times relevant to the MERGER, a publicly held corporation whose stock is and was traded on the New York Stock Exchange and the Pacific Stock Exchange. As of the end of March 1979, NL had outstanding approximately 32,533,000 shares of its single class of common stock (par value $2.50 per share) and 500,000 shares of preferred stock. See Exhibit F.

10. NLAC was a 100% owned subsidiary of NL.

11. Prior to April 18, 1979, neither Donald Clark nor Peggy Clark owned any stock in NL or NLAC.

12. An Agreement and Plan of Merger dated April 3, 1979 (Exhibit C) (hereinafter referred to as the "PLAN") was executed by BASIN, NLAC, Clark, and NL.

13. The PLAN provided that on April 18, 1979, BASIN would merge with and into NLAC.

14. The PLAN provided that, at the effective time of the MERGER, each outstanding share of NLAC would remain outstanding, each outstanding share of BASIN common stock would be exchanged for $56,034.482 cash and 5,172.4137 shares of NL common stock, and each share of BASIN common stock held in the treasury of BASIN would be cancelled.

15. The PLAN further provided that the articles of incorporation of NLAC would be amended to change its name to Basin Surveys, Inc. at the effective time of the MERGER.

16. For the purposes of this case, the parties agree that the MERGER was effected pursuant to, and qualified as a "reorganization" under, I.R.C. §§ 368(a)(1)(A) and (a)(2)(D).

17. A Certificate of Merger issued by the Secretary of State of West Virginia, together with the attachment thereto, (Exhibit D) certifies the merger of BASIN into NLAC in accordance with West Virginia law.

18. Pursuant to the PLAN, Donald Clark signed a covenant not to compete for five years and an employment agreement to remain with Basin Surveys Inc. for three years. Executed copies of these documents appear as Exhibits C and D to Exhibit C attached hereto (Exhibit C, pp. 101-113).

19. Pursuant to the MERGER, Clark received $3,250,000.00 in cash and 300,000 shares of NL stock.

a. The closing price of NL common stock on the New York Stock Exchange on April 18, 1979 was $23-1/8 per share (Exhibit E).

b. Based on that closing price, the NL stock received by Clark had a value of $6,937,500 which constituted 68.1% of the total value of the consideration which Clark received for his BASIN stock.

c. Immediately after and as a result of the MERGER, Clark owned 300,000 shares of NL common stock constituting approximately 0.92% of all outstanding NL common stock.

d. Clark has at no time owned NL preferred stock.

20. Clark's basis for his BASIN stock immediately prior to the MERGER was $84,515. He incurred expenses of $25,013 in connection with the MERGER.

21. In their joint Federal income tax return for 1979, petitioners reported recognition of $3,195,294 of long term capital gain as a result of the MERGER.

22. As of April 18, 1979, BASIN had total assets of $2,758,069 and liabilities of $808,132. Among its assets were $138,490 in cash, $1,231,552 in trade notes and accounts receivable (after allowance for bad debts) and

buildings and other fixed depreciable assets with a book value (after accumulated depreciation) of $929,306. (Exhibit G).

23. As of April 18, 1979, BASIN had accumulated undistributed earnings and profits of $2,319,611.00.

In accordance with the above terms, the below-signed parties agree to this STIPULATION OF FACTS.

JOEL GERBER
Acting Chief Counsel
Internal Revenue Service

By: THOMAS C. MORRISON 30 Mar 84
Thomas C. Morrison Date
District Counsel
422 Universal North Bldg.
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 376-0662

/s/ WALTER B. SLOCOMBE 20 Mar 84
Walter B. Slocombe Date

/s/ DANIEL B. ROSENBAUM 3/20/84
Daniel B. Rosenbaum Date

/s/ DANIEL M. DAVIDSON 3/20/84
Daniel M. Davidson Date
Caplin & Drysdale, Chartered
1101 17th St., N.W.
Washington, D.C. 20036
(202) 862-5000

STIPULATION EXHIBIT G–

Schedule L of Federal Income Tax Return of Basin Surveys, Inc. for period beginning February 1, 1979 and ending April 18, 1979

Form 1120 (1978)

Schedule L Balance Sheets	Beginning of taxable year		End of taxable year	
ASSETS	(A) Amount	(B) Total	(C) Amount	(D) Total
1 Cash		480,959		138,490
2 Trade notes and accounts receivable	973,418		1,270,785	
(a) Less allowance for bad debts	29,203	944,215	39,233	1,231,552
3 Inventories		91,932		91,932
4 Gov't obligations: (a) U.S. and instrumentalities				
(b) State, subdivisions thereof, etc.				
5 Other current assets (attach schedule)		50,685		62,188
6 Loans to stockholders				
7 Mortgage and real estate loans				
8 Other investments (attach schedule)		15,000		53,072
9 Buildings and other fixed depreciable assets	1,884,144		1,934,089	
(a) Less accumulated depreciation	946,680	937,464	1,004,783	929,306
10 Depletable assets				
(a) Less accumulated depletion				
11 Land (net of any amortization)		70,500		70,500
12 Intangible assets (amortizable only)				
(a) Less accumulated amortization				
13 Other assets (attach schedule)		191,996		181,029
14 Total assets		2,782,751		2,758,069
LIABILITIES AND STOCKHOLDERS' EQUITY				
15 Accounts payable		197,845		156,248
16 Mtges., notes, bonds payable in less than 1 yr.		93,538		93,940
17 Other current liabilities (attach schedule)		314,678		306,904
18 Loans from stockholders				
19 Mtges., notes, bonds payable in 1 yr. or more		182,956		182,214
20 Other liabilities (attach schedule)		68,826		68,826
21 Capital stock: (a) Preferred stock				
(b) Common stock	6,600	6,600	6,600	6,600
22 Paid-in or capital surplus		1,040		54,112
23 Retained earnings – Appropriated (attach sch.)				
24 Retained earnings – Unappropriated		2,110,125		2,082,082
25 Less cost of treasury stock		(192,857)		(192,857)
26 Total liabilities and stockholders' equity		2,782,751		2,758,069

Schedule M-1 Reconciliation of Income Per Books With Income Per Return

1 Net income per books	(14,971)	7 Income recorded on books this year not included in this return (itemize)	
2 Federal income tax		(a) Tax-exempt interest $_____	
3 Excess of capital losses over capital gains		C S V Life Ins	897
4 Income subject to tax not recorded on books this year (itemize)			
		8 Deductions in this tax return not charged against book income this year (itemize)	
5 Expenses recorded on books this year not deducted in this return (itemize)		(a) Depreciation $_____	
(a) Depreciation $_____		(b) Depletion	$2170
(b) Depletion $_____			2170
schedule attached	9,355	9 Total of lines 7 and 8	3067
6 Total of lines 1 through 5	(5616)	10 Income (line 28, page 1)—line 6 less 9	(8683)

Schedule M-2 Analysis of Unappropriated Retained Earnings Per Books (line 24 above)

1 Balance at beginning of year	2,110,125	5 Distributions: (a) Cash	
2 Net income per books	(14,971)	(b) Stock	
3 Other increases (itemize)		(c) Property	13,072
		6 Other decreases (itemize) to correct book balance as of date of distribution	
		7 Total of lines 5 and 6.	
4 Total of lines 1, 2, and 3	2,095,154	8 Balance at end of year (line 4 less 7)	2,082,082

UNITED STATES TAX COURT

Docket No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

SECOND STIPULATION FOR TRIAL

Pursuant to the terms and conditions set forth in the preamble to the First Stipulation, the parties agree to this Second Stipulation for Trial, as follows:

24. From on or about January 30, 1978 until the MERGER, Donald E. Clark was the sole shareholder of BASIN, owning all 58 of BASIN's outstanding shares of common stock.

25. As of January 1, 1978, Donald E. Clark owned 58 of 66 outstanding shares of BASIN common stock. The remaining 8 shares were owned by Jonathan B. Dagley, an employee of BASIN.

26. On January 16, 1978, Jonathan B. Dagley offered to sell his 8 shares of BASIN stock to BASIN, and the shareholders and directors of BASIN voted to accept this offer on January 30, 1978.

27. At all times after January 1964 until the MERGER, Donald E. Clark owned in excess of 85 percent of the outstanding common stock of BASIN.

28. At no time from the date of its incorporation until the MERGER has BASIN issued or been authorized to issue any stock other than a single class of common stock.

29. Attached hereto as Exhibits H through O are copies of the minutes of meetings of the shareholders and directors of BASIN showing the various changes in ownership of BASIN stock prior to the MERGER.

In accordance with the above terms, the below-signed parties agree to this Stipulation of Facts.

FRED T. GOLDBERG, JR.
Chief Counsel
Internal Revenue Service

By: THOMAS M. CRYAN/KEW 4/19/84
Thomas M. Cryan Date
Assistant District Counsel
Internal Revenue Service
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Counsel for Respondent

Walter B. Slocombe Date

Daniel B. Rosenbaum Date

Daniel M. Davidson Date
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Counsel for Petitioners

UNITED STATES TAX COURT

Docket No. 9428-83

IN THE MATTER OF:
DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Tuesday, May 1, 1984
North Courtroom
400 2nd Street, NW
Washington, D.C.

The above-entitled matter came on for hearing, pursuant to notice, at 1:58 p.m.

BEFORE: HONORABLE THEODORE TANNENWALD, JR.
Judge

APPEARANCES:

On behalf of the Petitioner:

DANIEL B. ROSENBAUM, ESQUIRE
DANIEL M. DAVIDSON, ESQUIRE
WALTER B. SLOCOMBE, ESQUIRE
1101 Seventeenth Street, NW
Washington, D.C. 20036
(202) 862-5071

On behalf of the Respondent:

KATHLEEN E. WHATLEY, ESQUIRE
1875 Connecticut Avenue, NW
Washington, D.C.

THE CLERK: All rise. Please be seated. Docket No. 9428-83, Donald E. Clark and Peggy S. Clark.

Please state your appearances.

MS. WHATLEY: Kathleen Whatley for the Respondent. Good afternoon, Your Honor.

THE COURT: Good afternoon, Ms. Whatley.

MR. SLOCOMBE: Walter Slocombe for the Petitioner and—

MR. DAVIDSON: Daniel M. Davidson for the Petitioner.

MR. ROSENBAUM: Daniel B. Rosenbaum for the Petitioner.

THE COURT: Gentlemen. You have a stipulation of facts that you want to offer into evidence?

MS. WHATLEY: Yes, Your Honor. The parties have physically lodged with the Court our first stipulation of facts, paragraphs one through 23 and Exhibits A through G. In addition we have lodged with the Court a second stipulation of facts, paragraphs 24 through 29 and Exhibits H through O. I move that they be admitted into evidence at this time.

THE COURT: Have we got a second [4] stipulation?

All rights.

The stipulations of fact with exhibits noted are received in evidence and made part of the record of the case.

(The documents referred to, having been previously marked for identification as Exhibits A through O were received in evidence.)

THE COURT: Please be seated or stand if you wish. I have read the trial memorandum—memoranda. I think I understand the issue and it's really the question of trying to straighten out the Shimberg and the Wright cases, assuming they can be straightened out.

I understand, Ms. Whatley, from your trial memorandum that you have some problems with the testimony and I will let you voice your objections when the time comes. It seems to me though, – well, I'm not at all sure it's relevant because I take a somewhat different view of the situation. Certainly if you read Wright and if you read Judge Simpson's opinion in McDonald, prior negotiations and the attitude of the people has some bearing.

[5] In fact, if I read McDonald correctly, Judge Simpson even suggests that it may make a difference as to whether it was the taxpayer or the acquiring corporation that came up with the idea of cash instead of stock, in part. So on that basis it seems to me that the background of negotiations and the intention of the taxpayer may be relevant. I'm not convinced it is.

I think you have a question here as to forgetting all the negotiations and everything else. When a situation such as this arises where there is a significant reduction in ownership in terms of the acquiring interest of the taxpayer and the acquiring corporation, that may still produce capital gain.

As I read the Shimberg case, dispite the disclaimers to the contrary, I think the court is coming awful close to reinstating the automatic divident rule in this type of case, where you have a sole shareholder, or indeed, you have more than one shareholder, cash is allocated pro rata.

So I'm going to let the evidence in. You might have you objection if you want it.

MS. WHATLEY: Yes, Your Honor. I would like to make it just for the record.

THE COURT: All right.

[6] Let's see how the testimony goes and what I might do is just give you a running objection to all testimony. Is there going to be any testimony other than the background of the negotiations and the intention of Mr. Clark?

MR. SLOCOMBE: No, Your Honor.

THE COURT: Well then, why don't we leave it this way, Ms. Whatley, that you have a running objection to the testimony of all the Petitioners' witnesses on the grounds of relevancy and materiality which I overrule in advance and you have your exception.

MS. WHATLEY: Thank you, Your Honor.

THE COURT: The record's protected. We won't waste time.

I'm perfectly willing to make the trial memorandum part of the record although I think there's not going to be anything in them that's not going to be shown in the testimony and referred to in the briefs. It's up to Counsel, I leave it to Counsel. Sometimes they want them made part of the record and most of the time they don't care. What's your wishes?

MR. SLOCOMBE: It makes no difference to us, Your Honor.

MS. WHATLEY: We're certainly –

[7] THE COURT: All right.

Then we'll leave it out. We will not make them part of the record. Now, I have indicated that I have read the memoranda. I think I know what's involved in the case and have indicated what I think the problems are. If your side wants to make an opening statement they're welcome to do so. Mr. Slocombe?

MR. SLOCOMBE: Your Honor, I don't think it's necessary to say anything by way of opening other than as Your Honor's correctly stated we intend to show in the testimony this afternoon, a little bit about the background of the negotiations and specifically, that at a negotiating session which was held on March 6, 1979, NL presented Mr. Clark with the choice between all-stock deal on the part of cash, part-stock deal, that that was a real and

serious offer, that he accepted one of those two choices, the part-stock, part-cash deal.

Beyond that we don't—

THE COURT: Well, let me ask you a question. Let me ask you a question, Mr. Slocombe. Suppose you didn't have this background? Suppose you just had the deal period as reflected in the agreement? Wouldn't you still be arguing for a long-time capital gain?

[8] MR. SLOCOMBE: We would, Your Honor, but think it is—

THE COURT: In other words, this is an an alternative position or buttressing position. If you have to get—if the background is important you think the background's in your favor.

MR. SLOCOMBE: That's correct.

THE COURT: Ms. Whatley?

MS. WHATLEY: Your Honor, the parties agree on the basic facts of what occurred here. You had the sole shareholder of a small corporation agreeing to poor triangular merger whereby his small corporation would be acquired by the larger corporation for stock and cash. It is Respondent's position that this Court should be guided by the analysis of the 5th Circuit in the Shimberg case. The facts of the Shimberg case are virtually identical to this case. We believe that the facts of Wright case and of McDonald are very different from the situation that was present both in Shimberg and in this case.

THE COURT: Well, I think that's probably true that they can be distinguished but if I understand Respondent's position correctly, it comes down that whenever you have a sole shareholder that goes out and trades his stock for stock and cash, [9] stock in a widely held, if not publicly held corporation and ends up with from what was 100 percent to a one percent interest, it doesn't really make any difference. The cash that he pulls out is the dividend.

MS. WHATLEY: Your Honor, it would be our position under the Shimberg analysis that where—

THE COURT: Doesn't that come close to the automatic dividend rule which Respondent, himself, has said he doesn't follow me.

MS. WHATLEY: I think were you have a pro rata distribution, Your Honor, of cash, whether it is pro rata to a single shareholder because he has only one shareholder or pro rata on all shareholders, and you have a small company that has accumulated undistributed earnings and profits, that you must test and determine whether that cash is really a disguised attempt to bail out what would have been dividend income under capital gain treatment. That is the context of this case. We do not have a situation like the Wright situation.

THE COURT: What would you do if the cash wasn't equivalent, wasn't enough, the cash that the acquired corporation was—let's take a figure. The taxpayer gets $10,000 in cash plus stock of the [10] acquiring corporation and the earnings and profits—and the cash, forget the earnings and profits. Let's assume the earnings and profits in the acquired corporation are equal to $10,000 but the balance sheet shows that at the date of the transfer the acquired corporation only had $1,000 in cash. Are you—would you come out the same way?

MS. WHATLEY: Yes, Your Honor—

THE COURT: You say that they have been deemed, they should have—you should treat this as though taxpayer turned in a sufficient amount of stock of the acquired corporation prior to the transfer to pull out enough assets, regardless of the character of the assets, that are equal to the earnings and profits of the acquired corporation. Is that the Respondent's position?

MS. WHATLEY: That is the analysis that was used in Shimberg.

THE COURT: Okay.

I just wanted to understand. Well, the 5th Circuit may be God to some people but not necessarily to this Court. I don't know how I'm going to come out. I think you've got a real sticky wicket here but I'm bothered by the interplay and if you do it—what you're, in effect, saying is there is no way that a [11] sole shareholder can have a merger with another company and get anything other than stock or securities. Let's put it that way, and avoid doing that trick.

MS. WHATLEY: Your Honor, I would modify that slightly in terms of if the four factors that were present in the Shimberg case are present, which would mean that the mergers between unrelated companies—

THE COURT: Well, if you have related companies I think you've got a whole new ballgame. You may be on stronger grounds with related companies than with unrelated companies. I'm talking about an unrelated company. It seems to me that you're right back, at least in the sole shareholder area or in any case where there's no matter how many shareholders in the acquired corporation, there's a pro rata payment of cash as well as stock, you're, in effect, saying got an automatic dividend.

MS. WHATLEY: I realize that it's a difficult question, Your Honor, but it is our position that the 5th Circuit's analysis is the correct analysis on the facts of the case.

THE COURT: In other words, you're blessing Shimberg for, in effect, abrogating what was the prior [12] position in Revenue rulings about the automatic dividend rule. It's all right.

If that's your position, fine. I just wanted to be sure I understood. All right.

Thank you very much.

MS. WHATLEY: Thank you, Your Honor.

THE COURT: Mr. Slocombe, call your first witness.

MR. SLOCOMBE: Your Honor, the first witness will be Ilan Kaufthal.

Thereupon,

ILAN KAUFTHAL

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

THE CLERK: You may be seated. Please state your name and address.

THE WITNESS: My name is Ilan Kaufthal. I reside at 376 Eaton Street in Englewood, New Jersey.

THE CLERK: Would you please spell your name, please?

THE WITNESS: First name is I-L-A-N. Last name is K-A-U-F-T-H-A-L.

DIRECT EXAMINATION

BY MR. SLOCOMBE:

Q Mr. Kaufthal, are you presently employed by [13] NL industries?

A Yes.

Q And what is your present position with them?

A I'm Vice President of Finance.

Q How long have you been employed by NL?

A 14 years.

Q During 1978 and 1979 what was your position with NL?

A I was then director of mergers and acquisitions and the assistant treasurer.

Q And in your capacity as Director of Mergers and Acquisitions what were your duties?

A I was responsible for identifying prospective acquisitions for carrying out negotiations, leading to the consummation of those acquisitions for explaining to the

Board of Directors and senior management, the rationale behind the desire to acquire those companies, and I also had those same responsibilities on divestitures within NL Industries.

Q And in that connection were you personally involved in the acquisition of Basin Surveys by NL?

A Yes. I was.

Q What was the nature of your involvement?

A I was brought in when our McCullough Division expressed an interest in acquiring Basin [14] Surveys to sit down Mr. Clark and Mr. Wallace and attempt to reach an agreement on that acquisition and again, at the same time, put together with the division the rationale and justification to our senior management as to why we wanted to make that transaction.

Q Very briefly for the record, could you identify what the McCullough Division is?

A Yes. The McCullough Division is the division, was and is a division of NL that's involved in the case hole and open hole logging business.

Q From whom did you get your instructions during these negotiations?

A From two individuals, Mr. Vincent McClean, who was then Executive Vice President of Administration for NL, and from Mr. Ray C. Adam, who was chairman, chief executive and president of the company.

Q And very briefly why was NL interested in Basin?

A Well, we thought that Basin would compliment McCullough's activities by giving the McCullough Division an open hole logging capability which it did not have at that point, and it was also a geographic compliment.

[17] Q Did NL or Mr. Clark initiate the negotiations about acquisition of Basin Surveys?

A My recollection is that we approached Mr. Clark through our McCullough operations and initiated the interest in the company.

Q And do you know when NL first approached Clark to begin those discussions?

A I can't recall exactly but it would have been somewhere in the 1978, second half of '78 based on the chronology of when the transaction finally took place and the discussions we had in the early part of '79.

Q Now, were your personally involved in the initial discussions?

A Not in the very first discussion but as I say I got involved after some discussions had taken place between our division and Mr. Clark.

Q And that would have been later on in 1978?

A Yes. Either later in '78 or very early '79.

Q And at the time your first became involved, what did Mr. Clark want in exchange for his basin Survey stock?

A My recollection is that we were talking about a $10 million proposition, is the way I recall the McCullough Division stating the situation to us.

[16] Q And did NL agree to that price?

A No.

Q Why not?

A We thought it was too high.

Q Did you have a negotiating meeting with Mr. Clark in early March of 1979?

A Yes. We did.

Q Where did that meeting take place?

A In our offices in New York, in the NL offices in New York.

A And who was present at the meeting?

A Myself, Vince McClean, Mr. Clark and Mr. Wallace.

Q And what was the purpose of that meeting?

A The purpose of the meeting was to try to arrive at a final agreement between the parties as to what the purchase price would be for the company and a form of the purchase price.

Q In the course of that meeting did you make a new offer to Mr. Clark?

A Yes. We did.

Q What were the terms of that offer?

A We basically told Don that we would either give him 425,000 shares of NL common stock, or give him $3.25 million and 300,000 shares of NL.

[17] Q Did you discuss that offer with anyone at NL before you made it?

A We discussed it with Mr. Adam and again with Mr. McClean. The three of us discussed that. Yes.

Q And that discussion was by telephone or face-to-face?

A It was face-to-face.

Q The offer was made orally or in writing?

A It was made orally.

THE COURT: Excuse me. May I ask a question? If I understand the figures correctly, the $10 million that Mr. Clark originally wanted ended up being eight and one-half?

THE WITNESS: It ended—

THE COURT: 425,000 shares that—

THE WITNESS: —that's the number, yes, based on about a $20 stock price which I recall of the—at that time.

BY MR. SLOCOMBE:

Q When you made this offer to Mr. Clark did you know in advance which, if either, of the alternatives he would accept?

A No.

Q Was NL prepared to go forward with the transaction on the basis of whichever of the two [18] alternatives Clark might accept?

A Yes. We were.

Q Both of the alternatives involved receipt by Mr. Clark of NL stock. Were you offering to give him stock which was freely transferrable or would there have been some restrictions on transfer?

A No. There would have been some restrictions.

Q Would it be correct to say that under the terms of the alternative offer Mr. Clark had a choice of receiving—

MS. WHATLEY: Objection, Your Honor.

THE COURT: Why?

MS. WHATLEY: That's a leading question.

THE COURT: Shall we let him finish the question before we say whether it's leading or not? Go ahead, Mr. Slocombe.

BY MR. SLOCOMBE.

Q Would it be correct to say that under the terms of the alternative offer Mr. Clark had a choice of getting $325 million in cash or an additional 125,000 shares of NL stock?

A $325 million cash?

Q Wish he had. $3.25 million in cash, or an additional 125,000 shares of NL stock.

[19] A That's correct.

THE COURT: I don't see—the agreement speaks for itself. If he wants to say what he thinks the agreement says, I don't see any harm in it.

BY MR. SLOCOMBE.

Q If my mathematics is correct that works out to $26 a share. How did that $26 per share compare with the stock exchange price of NL stock at that time?

A Well, my recollection, Mr. Slocombe, is that we were trading in approximately $20 a share at the time this negotiation took place.

Q Why was NL willing, in effect, to give Clark more in cash than the market value of the NL stock he was being offered?

A Well, NL was—

THE COURT: Yes, Ms. Whatley?

MS. WHATLEY: Your Honor, I would just like to clarify whether my continuing objection on grounds of relevancy.

THE COURT: You have a continuing objection of all the testimony of all the Petitioner's witnesses.

MS. WHATLEY: Thank you, Your Honor.

THE WITNESS: NL felt very strongly at that [20] time, this was early '79, the oil embargo had occurred a couple of years earlier, the business was doing well, the Natural Gas Policy Act had been passed which was going to encourage drilling for natural gas in our opinion. Just generally the atmosphere of the industry made us believe, including some knowledge we had obviously of our own businesses and where they were headed, that NL was going to be doing very well over the next few years and that the stock price of NL would increase in value. We frankly preferred to have less shares outstanding and to give less shares away if we could do that.

BY MR. SLOCOMBE.

Q When you made the offer did you believe there was a real chance that Mr. Clark would accept the all-stock alternative?

A Yes.

Q To go back to the meeting, what did Mr. Clark do after you made the offer, the alternative offer, to him?

A Well, my recollection is that he asked McClean and I for some time to talk to Mr. Wallace and we left the room and waited for him to tell us he wanted us to come back in so he could tell us his reaction.

[21] Q And approximately how long was that period when you were out of the room?

A I don't recall for sure, a half an hour, not a very lengthy time period.

Q And what happened when you re-entered the conference room?

A Mr. Clark and Wallace indicated that they would accept the offer that included cash and stock.

Q Are you aware of any correspondence or any other written document that was given to Mr. Clark or Mr. Wallace which set forth the terms of the alternative offer in writing for which you made orally to Mr. Clark on March 6th?

A No, sir.

Q Are you aware of any such document that would be an internal NL memorandum or record?

A Not describing that negotiation.

Q In 1978 and 1979 was NL engaged in acquiring or negotiating to acquire other business besides Basin Surveys?

A Yes, sir.

Q Approximately how many such potential acquisitions were in consideration?

A I would say probably a half a dozen.

Q Relative to these other acquisitions, did [22] you consider the Basin Surveys acquisition to be a major one?

A No, sir.

Q Based on your experienced at NL, would it be unusual in an acquisition like the Basin case for there to be no written record either internal or given to the other side evidencing these offers that were made by NL?

A Well, it would not be unusual not to have a written record in a transaction of this size going out to the offeree.

Q Briefly, why is that such negotiations were conducted and be authorized most unorderly?

A Well, first of all, the Chairman of the company at that time, Mr. Adams, very much believed in an informal, unstructured, environment, and we operated that way as a company. Many, many of our discussions related to acquisitions of this nature took place verbally between myself and Mr. McClean.

As far as our communication with Mr. Clark was concerned, we believed at that time, that other companies were interested in Mr. Clark's company. We believed that it was harmful for NL to have an offer a formal offer spelled out on paper transmitted to the offerr which he could take, if he wish, and attempt to [23] have someone else bid a better price. We preferred to have that left verbally and not on a piece of paper. We didn't see any advantage of having it spelled out on a piece of paper.

Q Had you at any point in the previous stages of negotiation given Mr. Clark or Mr. Wallace a piece of paper reflecting NL's negotiating position?

A There was one piece of paper which we discussed with them which was labelled "Discussion Draft." I believe that Mrs. Whatley looked at that and asked me to bring a copy, which I did. And that was a piece of paper that had spelled out on it, a transaction which involved convertible preferreds and some other terms incident to that, but that was the only piece of paper that I recall or have seen that related to that two alternatives, to the deal that we finally did.

Q Now, what happens after the part stock-part cash offer was accepted?

A We basically moved ahead to try to consumate the acquisition as rapidly as possible.

Q And did that include the drafting of formal documents?

A Yes, sir. I was involved in coordinating all of that, drafting of the documents and all the [24] other incident features that related to it.

Q And those documents reflected only the agreement which was actually agreed?

A Yes, sir.

Q Did NL, in effect, transfer to Clark 300,000 shares of NL stock and $3.25 million in cash in connection with the merger?

A Yes, sir.

Q And from what source did NL obtain that $3.25 million in cash?

A From internal funds.

Q And after it became a subsidiary of NL did Basin Surveys reimburse NL for all or any part of that $3.25 million in cash?

A No, sir. We didn't.

MR. SLOCOMBE: No further questions.

THE COURT: Ms. Whatley?

CROSS-EXAMINATION

BY MS. WHATLEY:

Q Thank you, Your Honor.

Mr. Kaufthal, did NL Industries initially make a cash offer to Mr. Clark?

A I don't recall ever having made a cash offer to him.

Q Are you aware of whether the McCullough [25] Division personnel may have made made an initial cash offer or talked in terms of a cash acquisition with Mr. Clark?

A Ms. Whatley, I'm not and I might add that it would have been highly unusual for a division to discuss or negotiate in any form with a respective offeree. Their strict instructions were that they were simply to understand

what the company wanted for selling out and then to get the New York office involved which is, I believe, the way it happened here.

THE COURT: Let the record show that Ms. Whatley's questioning Petitioner's witnesses does not in any way, undermine the validity of her objection.

BY MS. WHATLEY:

Q Thank you, Your Honor.

Mr. Kaufhal, you referred to a discussion draft on direct examination and you stated that that discussion draft was given to Mr. Clark at one point during the discussion. Is that correct?

A When you say given, I reviewed with him. I believe I never, in fact, formally gave him a copy of it. I can't recall for certain but the purpose of it was to discuss the concept which never went very far.

Q And the concept was for an eight percent [26] convertible preferred with a ten-year maturity date. Is that correct?

A Yes.

Q And the conversion terms would be that it would be initially convertible into NL common stock as $30 a share?

MR. SLOCOMBE: Your Honor?

THE COURT: Yeah?

MR. SLOCOMBE: Would it be appropriate to ask that the document be introduced so that it can be—the whole text of whatever it says can be reflected in the record?

THE COURT: What about it, Ms, Whatley?

MS. WHATLEY: Your Honor, I have no problems with offering it as an exhibit if Petitioner's counsel is indicating that they will stipulate to it as an exhibit.

THE COURT: Do you stipulate to it?

MR. SLOCOMBE: I'd need to look at it first but I think so.

THE COURT: You asked him about a discussion draft. I assume you would have seen this.

MR. SLOCOMBE: This is the document Mr. Kaufthal brought with him pursuant to the subpoena.

THE COURT: Why don't we have it stipulated [27] as Exhibit—what is it?

MS. WHATLEY: I have this marked as Exhibit P.

THE CLERK: Respondent's Exhibit P marked for identification.

(The document referred to was marked for identification as Respondent's Exhibit P.)

THE COURT: Respondent's Exhibit P is received in evidence and made part of the record in the case.

(The document referred to, having been previously marked for identification as Respondent's Exhibit P was received in evidence.)

BY MS. WHATLEY:

Q And you stated that these terms for the convertible preferred were discussed with Mr. Clark at one point in the negotiation?

A Yes.

Q NL Industries did not issue more than 300,000 shares of common stock to Mr. Clark, did it?

A No. I don't believe. I don't believe it did.

[28] MS. WHATLEY: Your Honor, I have no additional questions of this witness.

THE COURT: All right.

Do you have any further questions on redirect, Mr. Slocombe?

REDIRECT EXAMINATION

BY MR. SLOCOMBE:

Q Just one.

Were the terms of the discussion draft—when you presented the discussion draft did that meet sufficient interest with Mr. Clark that the idea was pursued?

A No. I'm glad you asked that question. I think it's important to note that that was, in fact, our concept of a transaction which might make sense to NL Industries, which I reviewed and discussed with Mr. Clark and Mr. Wallace as an example of the kind of instrument that we could put together specifically again to have NL, in effect, give away it's common stock upon conversion at a higher price than it was then trading for. It did not meet with any kind of interest and it was then trading for. It did not meet with any kind of interest and it was abandoned very early on because we felt it was just not going to become realistically something that they would be interested in receiving for their company.

[29] MR. SLOCOMBE: Thank you. No further questions.

THE COURT: Ms. Whatley?

Thank you very much.

THE WITNESS: Thank you, sir.

THE COURT: Call your next witness, Mr. Slocombe

MR. SLOCOMBE: Petitioners would call Mr. Robert J. Wallace.

Thereupon,

ROBERT J. WALLACE

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

THE CLERK: Please be seated and state your name for the record.

THE WITNESS: My name is Robert J. Wallace, W-A-L-L-A-C-E. I reside at 1 Christopher Lane, Buckhannon, B-U-C-K-H-A-N-N-O-N, West Virginia.

DIRECT EXAMINATION

BY MR. DAVIDSON:

Q Mr. Wallace, what is your present occupation?

A I'm an attorney.

Q And are you involved with a lawfirm, corporation?

[30] A I live sort of a dual life. I have a private law practice in that I am a partner of the lawfirm of Colton and Wallace at Buckhannon. I also serve as an in-house counsel for an oil and gas drilling corporation at Buckhannon called Union Drilling.

Q Have you held any position in the West Virgina Bar?

A I'm past president of the West Virginia State Bar—

MS. WHATLEY: Your Honor, are his offices with the Bar—

THE COURT: I agree. This is not an expert. He's a lawyer. I'm willing to accept him. Let me also suggest to you—

MR. DAVIDSON: Mr. Davidson.

THE COURT: Mr. Davidson, I'm trying to get Daniels straight. Mr. Wallace was in the room so except to the extent that you feel you have to you can ask him just—he heard the previous witness testify. I don't know whether you intend to take him through the same routine.

MR. DAVIDSON: It was our intention to cover the negotiations in light of Respondent's reluctance to stipulate—

[31] THE COURT: No. I understand that. But he sat in this room and heard the previous witness testify. Why don't you just ask him have you heard the previous witness testify? Unless you think there are differences in his knowledge that has to be brought out, I'm just suggesting a way to telescope this. I don't—

MR. DAVIDSON: I know. I appreciate that, Your Honor.

Your Honor, to telescope it, I would just ask him about the events at the meeting that we're focused on.

THE COURT: All right.

Ms. Whatley, do you want Mr. Davidson to take him through each step all over again?

MS. WHATLEY: Your Honor, I don't believe that will be necessary.

THE COURT: Okay. Fine.

BY MR. DAVIDSON:

Q Mr. Wallace, you were involved in the—were you involved in the negotiations between Mr. Clark and representatives at NL?

A Yes, sir.

Q And what was the nature of your involvement?

A I represented Mr. Clark in Basin Surveys in [32] the negotiation.

Q And were you present at a negotiating meeting between Mr. Clark and NL on March 6, 1979?

A That was one of a number of meetings that I attended.

Q Who was present at that meeting?

A Mr. Clark and myself, Mr. Ilan Kaufthal and Mr. Benson McClean.

Q Where was that meeting held?

A At the NL corporate headquarters in New York City.

Q At that meeting did Mr. Kaufthal make an offer to Mr. Clark?

A Yes.

Q What was the nature of that offer?

A The offer that he made was exactly the one that he testified to earlier. He offered an alternative. I say he, I mean NL.

Q Uh-huh.

A They gave us a choice of 425,000 shares of NL stock or 300,000 shares and $3.25 million.

Q After Mr. Kaufthal made the offer you just described, what did Mr. Clark do?

A We asked that Mr. McClean and Mr. Kaufthal leave the room and at that point we thoroughly [33] discussed the offer. We were a bit surprised by the alternative offer of all stock in that we had initially sought an all stock transaction and NL had indicated to us that they were not willing to do an all stock transaction so that the negotiations prior to that point over a period of time, generally focused in on different ways that we might be able to do the deal without actually doing an all stock deal.

Q What was the all stock transaction that Mr. Clark originally sought?

A 500,000 shares of the NL stock.

Q At the March 6, 1979 meeting did Mr. Clark respond to this alternative offer he was given?

A Yes. After we thoroughly digested the offer and discussed that there is ramifications of it we, at that point, decided that we would take the part/cash, cash/part stock offer.

Q Did NL keep the all stock alternative open to Clark for a period of time following March 6 so that he might give the matter further thought?

A Yes. We were told that even after that meeting if we wanted to change our minds and go into—take the all stock offer, that we'd still have the opportunity to do so.

Q Now, did Mr. Clark subsequently confirm to [34] Mr. Kaufthal his acceptance of the cash and stock alternative?

A Yes.

Q And approximately when did that occur?

A My best recollection, the latter part of March, some meeting, I think March 29th.

Q Now, Mr. Wallace, you indicated that early in the negotiations, Mr. Clark was looking to receive 500,000 shares of NL stock and no cash in exchange for his Basin Surveys?

A That's correct.

Q Yet on March 6 when he was presented with an alternative choice between an all stock and a cash and stock arrangement he chose the cash and stock arrangement. From your discussions with Mr. Clark, do you know why he made that decision?

A In part upon my recommendations. During the course of the negotiations I think our position changed rather substantially on what would be in the best interest as far as Mr. Clark was concerned. First of all, there was a question that Mr. Clark, who was not the rich man but whose livelihood was tied up in his company, if he accepted an entire total of all stock offer he, in my judgment, was running a very substantial risk. If something happened to NL [35] and NL stock, he stood to take a very substantial loss.

Because of that I thought it would be best maybe for Mr. Clark to hedge his bet and take some cash along with the stock. Secondly, there was the question of the fact that the stock would be a registered – not a registered stock but more or less a restricted letter stock, which became clear to us during the course of our discussions, which meant that Mr. Clark would have to hold that stock for a couple of years, basically, before he could realistically do anything with it other than sell it as letter stock which would impair the value of it. That gave me concern.

Thirdly, it was a practicality of the fact that as I indicated, Mr. Clark's whole life was tied up in his company. If, in fact, he didn't get any cash out of the deal he was going to have to wait for a couple of years really before he had any economic realization from the transaction, which

would have meant that this outstanding bills would have remained outstanding, what have you. Those factors plus just pure economics of the situation led us to believe that we would be better off to take the part cash/part stock offer.

[36] Q When Mr. Kaufthal presented Mr. Wallace during the March 6, 1979 meeting did you take notes?

A Yes.

MR. DAVIDSON: Your Honor, I ask that the sheet of yellow legal paper that I have in my hand be marked for identification as Petitioner's Exhibit 1.

THE CLERK: Petitioner's Exhibit 1 marked for identification.

(The document referred to was marked for identification as Petitioner's Exhibit 1.)

MR. DAVIDSON: Your Honor, in order to save time we've decided not to proceed further on this line. I have no further on direct.

THE COURT: That includes those notes?

MR. DAVIDSON: That includes these notes.

THE COURT: All right.

Ms. Whatley:

CROSS-EXAMINATION

BY MS. WHATLEY:

Q Thank you, Your Honor.

Mr. Wallace, were you involved in all of the discussions between Mr. Clark and the representatives of NL Industries?

A The initial contact meeting Mr. Clark had by [37] himself, I was not present. I was involved in all of the other meetings that were held. There were also some telephone conversations, of course, between Mr. Clark and NL representatives that I would have not been a party to.

Q Do you remember anyone at any point in the discussions offering Mr. Clark all cash for Basin Surveys?

A There was—let me put it this way. This thing dragged on over a long period of time. There were a number of different alternatives that were explored. As far as actual offers that were made, they weren't made until that March 6 meeting.

Q Do you remember anyone exploring the alternative of an all cash deal?

A I recollect that we discussed it and the ramifications of it along with three or four other possible approaches.

Q Do you remember the range of an all cash offer?

A Mr. Clark zeroed in on 500,000 shares at the $20 per share equivalency very early in the negotiations and that, basically, was the bottom line that we talked about.

Q Do you remember anyone from NL discussing a [38] cash pay fare in the range of $8.5 to $9 million?

A There was a preferred stock discussion of $7.5 million at one point.

Q In terms of cash?

A There could have been. I really don't recall.

MS. WHATLEY: No further questions, Your Honor.

THE COURT: Thank you very much, Mr. Wallace.

THE WITNESS: Yes, sir.

THE COURT: Call your next witness, Mr. Slocombe.

MR. SLOCOMBE: Your Honor, it has been our intention to call Mr. Clark at this point. I have no desire to burden the record. His testimony will be substantially identical to what you've already heard and I'll be guided by Your Honor's—

THE COURT: Do you want to question Mr. Clark?

MS. WHATLEY: Your Honor, I would have only one question and that would concern whether he had any memory of a cash offer.

THE COURT: Well, do you want to put him on the stand for that purpose? Do you have an [39] objection]

MR. SLOCOMBE: If I put him on the stand I'll ask him a question about the meeting.

THE COURT: Well, you don't have to put him on the stand. He's here in the room. She can call him as her witness if she wants.

MR. SLOCOMBE: Why don't we call him and I'll ask him a couple of questions about the meeting, and she can re-examine him.

THE COURT: Okay.

Thereupon,

DONALD E. CLARK

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

THE CLERK: Please be seated and state your name and address.

THE WITNESS: Donald Eugene Clark, Pennsicola, Florida.

DIRECT EXAMINATION

BY MR. SLOCOMBE:

Q Mr. Clark, did you attend a meeting with representatives at NL on March 6, 1979?

A I did.

Q And that meeting was at NL headquarters in New York and it was attended by Mr. McClean, Mr. [40] Kaufthal, Mr. Wallace and yourself?

A Yes.

Q And at that meeting did Mr. Kaufthal make an offer to you with respect to the acquisition of Basin Surveys?

A He did.

Q And what were the terms of that offer?

A 425,000 shares common stock or 300,000 shares common stock and $3.25 million.

Q And did you consider that offer?

A I did.

Q And approximately how long did you and Mr. Wallace discuss it?

A 20, 30 minutes.

Q And what, at that point Mr. Kaufthal and Mr. McClean came back into the room?

A They did.

Q And what did you say to them?

A We told them that at this time we would accept the part cash and part stock.

MR. SLOCOMBE: No further questions.

THE COURT: Ms. Whatley?

CROSS-EXAMINATION

BY MS. WHATLEY:

Q Mr. Clark, during the roughly one year that [41] the discussions went back and forth between you and various people of NL Industries, do you remember anyone suggesting that NL purchase your company for all cash?

A No, I don't.

MS. WHATLEY: No further questions, Your Honor.

THE COURT: Thank you very much, Mr. Clark.

Mr. Slocombe, do you have any further witnesses?

MR. SLOCOMBE: No. Your Honor.

Ms. Whatley?

MS. WHATLEY: No, Your Honor.

THE COURT: All right.

Before I—please be seated. Before I fix the time for filing briefs, Ms. Whatley, let me throw something out here.

And I haven't looked at the Shimberg case—you may remain seated if you want—

MS. WHATLEY: Thank you, Your Honor.

THE COURT: You don't have to worry about that. But it looks to me—let me put it this way. If Basin Surveys had had $3,250,000 in cash sitting in its coffers or even cash plus investments and even if you wanted to go so far as to include accounts receivable as the equivalent of cash, which is [42] questionable, I might think you have a leg to stand on but here you have a situation where first of all, the purchaser, the acquiring corporation, meaning NL, was putting up a real slug of cash out of its own funds. You just couldn't get that out of Basin Surveys.

And, indeed, if you look at the assets and liabilities even if Mr. Clark had liquidated completely Basin Surveys he wouldn't have gotten all of the earnings and profits out, not after he got through paying the liabilities. And if he liquidated it all, I don't think he would have had a merger. The only you can say he would have gotten all of the earnings and profits out would be to allocate some kind of going concern value to the value on liquidation in order to give him a big capital gain and if he liquidates, he doesn't have a merger.

Yet, that's the only way it seems to me he could have gotten the money and to say that under these circumstances that, boo, maybe I'm being too realistic and too practical but I got problems and you better compare before you jump on Shimberg and I didn't go look because I didn't think about this—this idea didn't come to me except in the last half hour. I have a feeling that she and Shimberg, there was enough cash sitting around in the corporation to [43] cover the cash that Shimberg got. I may be wrong on that, but I think you may have a problem in this area.

Unless you're going to go for the rule that no matter the nature of the assets of the acquired company all you do is

look at the earnings and profits, look at the amount of cash that comes out that the taxpayer gets. It doesn't make any difference where the cash came from or whether there was enough cash in the acquired corporation to cover it, ipso factor, it's a dividend, and that just is a rule of law bothers me.

Anyway, I assume I will be educated on brief. What kind of time do you want for briefs?

MS. WHATLEY: Your Honor, we discussed this prior to the beginning of the trial. Respondent was prepared to have 120 days for the opening brief because Respondent's counsel has a week-long trial with Judge Cohen at the end of June on U.S. Steel. A 90 day brief schedule would create some problems for me. I would prefer 120 days.

THE COURT: Mr. Sloccombe?

MR. SLOCOMBE: We would be prepared to go forward on the basis of 90 days. I understand that Ms. Whatley–

THE COURT: Well, I'm going accommodate Ms. [44] Whatley for 30 days. What do you want for a reply brief?

MS. WHATLEY: 60 days, Your Honor?

THE COURT: All right.

I would think you wouldn't need it but I'll give you 120 days for original briefs and let's take 30 days for reply briefs. I know you've got problems getting it through the national office but the national office clears the original briefs. They ought to clear the reply brief. What's wrong with 30 days?

It's going to interfere with your summer vacation.

MR. SLOCOMBE: Not with 120 days it won't

THE COURT: I will give you 120 and 60 but I don't want any extensions asked for.

MS. WHATLEY: That's fine, Your Honor.

THE COURT: That goes for both sides.

MR. SLOCOMBE: Yes, sir.

THE COURT: All right.

120 days for original briefs and 60 days for – unless you want seriatim briefs.

MS. WHATLEY: That's the first time I changed, Your Honor.

THE COURT: All right. You want to be sure he doesn't have the last word. It that it?

Okay.

120 days for original briefs, 60 days for reply briefs. The clerk will announce the dates.

THE CLERK: August 29, 1984, and reply briefs November 29, 1984.

THE COURT: Thank you very much, It was an Interesting case. I don't know whether my doubts are going to be sustained through the final opinion or not. We shall see. Anything further?

MS. WHATLEY: I believe 60 days–

MR. SLOCOMBE: It would be late in October rather than late in November.

THE COURT: June, July, August. That's right, Kim.

THE CLERK: October.

THE COURT: Thank you very much.

MS. WHATLEY: Thank you, Your Honor.

MR. SLOCOMBE: Thank you, Your Honor.

THE COURT: Off the record. The Court stands recessed until tomorrow morning.

THE CLERK: All rise.

(Thereupon, proceedings were concluded.)

UNITED STATES TAX COURT

Docket No. 9428-83

DONALD E. CLARK AND PEGGY S. CLARK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DECISION

Pursuant to the opinion of the Court filed on February 6, 1986, as amended by the Court's Order dated March 7, 1986, and incorporating the facts recited in the petitioners' computation as the findings of the Court, it is:

ORDERED AND DECIDED: That there is a deficiency of $14,171 in petitioners' income tax liability for 1979.

/s/ THEODORE TANNENWALD
Theodore Tannenwald
Judge

Entered: SEP. 18, 1986

It is stipulated that the foregoing decision is in accordance with the opinion of the Court and the petitioners' computation, and that the Court may enter this decision.

WILLIAM F. NELSON
Chief Counsel
Internal Revenue Service

By: MELVIN E. LEFKOWITZ/KEW SEP 5, 1986
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In the Supreme Court of the United States

No. 87-1168

COMMISSIONER OF INTERNAL REVENUE, PETITONER

v.

DONALD E. CLARK, ET UX.

ORDER ALLOWING CERTIORARI. Filed March 7, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60807